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In The
Supreme Court of the United States
October Term, 1982

Donald T. Regan, Secretary of the Treasury, *et al.*,
Appellants,
v.
Taxation With Representation of Washington,
Appellee.

On Appeal from the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF DISABLED AMERICAN VETERANS AND PARALYZED VETERANS OF AMERICA IN SUPPORT OF THE UNITED STATES

Joseph C. Zengerle *
Zachary R. Karol
Byron R. Trauger
Katherine H. Wheatley
Bingham, Dana & Gould
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 822-0220
Counsel for Disabled American Veterans and Paralyzed Veterans of America
*Counsel of Record

Wilkes - Byer Printing Co., Inc. - 783-0000 - Washington, D.C. 20001

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IN THE

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OCTOBER TERM, 1982

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICI CURIAE* OF DISABLED AMERICAN VETERANS AND PARALYZED VETERANS OF AMERICA IN SUPPORT OF THE UNITED STATES

INTERESTS OF *AMICI CURIAE*

The Disabled American Veterans ("DAV") and the Paralyzed Veterans of America ("PVA"), *amici curiae* herein, are national nonprofit veterans' organizations. DAV and PVA are exempt from federal income taxation pursuant to Sections 501(a) and 501(c)(4) of the Internal Revenue Code,[1] and contributions to them are tax-

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[1] Citations to provisions of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §§ 1 *et seq.*, will hereinafter be made to "Section ——."

deductible under Section 170(c)(3).[2] Both DAV and PVA are chartered by Acts of Congress, 36 U.S.C. §§ 90a *et seq.* and 1151 *et seq.*, and engage in a broad range of activities in furtherance of their charter purposes. Among those activities, each seeks to influence legislation and confines such effort essentially to matters directly or indirectly affecting veterans' benefits.

The importance of legislative activities to DAV and PVA is underscored by their memberships and the service each organization seeks to render. DAV, one of the nation's largest veterans' organizations with more than 2,500 chapters nationwide, has more than 700,000 members, each of whom possesses a service-connected disability. PVA, with 35 chapters across the United States and abroad, has 11,000 members who represent more than half of all American veterans with spinal cord injury or disease. DAV and PVA also conduct extensive service programs to assist their members and others in obtaining the benefits to which their status entitles them. DAV operates the largest national service program of all the nation's veterans' organizations; PVA's service program is uniquely skilled in assisting the catastrophically disabled.

The knowledge *amici* gain from interaction with their memberships and from experience with their service programs enables them to develop comprehensive views about the needs of veterans. Tax-deductible contributions, which constitute the great preponderance of their annual revenue, enable *amici* to communicate these views to Congress. However, the decision of the Court of Appeals now before this Court could force *amici* to choose between continuing their legislative programs unchanged and preserving the tax-deductibility of donations they receive. Because of *amici's* substantial interest in avoiding the necessity of such a choice, DAV and PVA sought unsuccessfully to

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[2] *See IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code* (1982).

intervene in this case as appellants,[3] and now seek to express their views to this Court as *amici curiae*.

SUMMARY OF ARGUMENT

Congress performs various constitutional functions with respect to veterans' affairs, the most important being legislation and oversight. The wise and effective performance of these functions depends upon the quality of information Congress obtains concerning the needs of veterans and the manner in which measures designed to serve those needs have been implemented. Congress knows that veterans' organizations possess a unique store of invaluable information on those subjects. The decision of Congress not to extend to veterans' organizations the same restriction on lobbying activities it imposed on charities in the Internal Revenue Code is a means to insure that veterans' organizations would continue to supply such vital information to Congress without impediment. That decision is thus one which serves the interests of Congress itself in the exercise of its constitutional powers and the discharge of its constitutional obligations.

The Court of Appeals considered only the speech interests of private entities when it analyzed the tax differential at issue. Congress's independent interests in receiving information were ignored. In consequence, the deference to a coordinate branch of government called for by the principle of separation of powers was reflected neither in the lower court's determination of the appropriate standard for equal protection review of the statutory classification, nor in the application of that standard. For these and other reasons, the Court of Appeals erred

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[3] *See* 50 U.S.L.W. 3998 (U.S. June 22, 1982). As officials of both DAV and PVA stated, *amici* were unaware of the pendency of this case until after the decision of the Court of Appeals en banc issued. *See* affidavits of Norman B. Harnett and R. Jack Powell, submitted as appendices to *amici's* Motion to Intervene, etc., filed herein on June 4, 1982.

in applying a "heightened level of scrutiny" to the classification and in concluding that "absolutely no governmental interest whatsoever" exists to support it. *Taxation with Representation of Washington v. Regan*, J.S. at 43a, 66a.[4]

In reviewing legislation which not only regulates the affairs of private persons in their relationship with public institutions, but which also directly affects Congress's ability to fulfill its own constitutional responsibilities, a court should show considerably greater deference to the judgment of Congress than was shown by the Court of Appeals. "[I]n no matter should [courts] pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980). If such legislation is rationally related to the objective of assisting Congress in the performance of its constitutional functions, it is inappropriate, except perhaps in the most extreme case, for a court to declare such legislation invalid. Even disregarding the deference called for by the doctrine of separation of powers, the impact of the tax differential on appellee's fundamental rights under the First Amendment is not sufficiently direct or substantial to warrant application of a standard of review stricter than the rational basis test.

The tax differential here manifestly satisfies at least this standard of equal protection scrutiny. First, Congress enacted the lobbying restriction for the legitimate purpose of protecting itself from wealthy donors seeking to misuse the tax status of charities. Because of its greater familiarity with the lobbying activities of veterans' organizations, Congress had sound reason to believe that the membership and charter restrictions which applied

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[4] The opinion of the Court of Appeals is reported at 676 F.2d 715 (D.C. Cir. 1982), and reprinted in the appendix to the Jurisdictional Statement of the United States ("J.S."). Citations to the opinion will hereinafter be made to "*Taxation*, J.S. at ——."

uniquely to veterans' organizations made them less subject than charities to such abuse.

Second, Congress highly valued the information it obtained from veterans' organizations. This assessment, too, was soundly based because veterans' organizations were uniquely positioned to acquire information of particular relevance to Congress. Through communication with their memberships and the operation of their service programs that assist veterans' benefits claimants, veterans' organizations acquire valuable information about the needs of individual veterans as well as the functioning of the Veterans Administration. Such information is plainly of importance to the public policy decisions Congress must make regarding veterans' affairs. Congress's desire to obtain this information from veterans' organizations rationally justifies its refusal to extend the lobbying restriction to them.

ARGUMENT

THE INTERNAL REVENUE CODE'S DIFFERENT TREATMENT OF THE LOBBYING ACTIVITIES OF VETERANS' AND CHARITABLE ORGANIZATIONS DOES NOT VIOLATE THE EQUAL PROTECTION PRINCIPLE EMBODIED IN THE FIFTH AMENDMENT.

Organizations whose income is exempt from taxation under Section 501(c)(3), referred to generally as "charitable organizations," may receive tax-deductible contributions under Section 170(c)(2) but are limited in the proportion of their activities that can be devoted to lobbying. Veterans' organizations, exempt from income taxation under either Section 501(c)(4) or Section 501(c)(19), may receive tax-deductible contributions under Section 170(c)(3) without regard to the extent of their lobbying activity. *Amici* submit that the Court of Appeals' conclusion that this different tax treatment violates appellee's right to equal protection of the laws is

erroneous for two reasons.[5] First, the lower court failed to accord proper deference to the Congressional classification; second, it failed to identify and accord proper significance to the important governmental interests served by that classification.

I. The Court of Appeals Applied an Erroneous Standard of Review Because it Did Not Consider the Interests Congress Has as a Coordinate Branch of Government in the Tax Differential at Issue, and Because it Gave Undue Weight to the Effect of the Differential on Appellee's First Amendment Rights.

A. *The principle of separation of powers requires this Court to review the tax differential with great deference, because the classification assists a coordinate branch of government to perform its constitutional functions.*

In analyzing the equal protection issue in this case, the Court of Appeals amply considered appellee's interest in speaking, but did not consider at all Congress's independent interest in receiving information. Indeed, since the lower court gave no weight to Congress's power to obtain information and to obtain it in the manner that best enables it to discharge its own constitutional obligations, the court's analysis would have been no different had this case involved only appellee's right to address the public generally, rather than its right to communicate directly with Congress. *Amici* will demonstrate that a substantial reason supporting Congress's different tax

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[5] The Court of Appeals rejected appellee's claim that the lobbying restriction in Section 501(c)(3) violated its First Amendment rights and that it was therefore entitled to exemption from federal income taxation despite its stated intention not to comply with that restriction. *Taxation*, J.S. at 34a-35a. It is the understanding of *amici* that appellee's First Amendment argument is not now before the Court because its cross-appeal has not been allowed and because the United States' appeal did not raise that issue. Accordingly, *amici* will not address the First Amendment issue raised below.

treatment of veterans' organizations is to facilitate Congress's receipt of information that is uniquely possessed by those organizations and vital to the effective performance of Congress's constitutional functions as they bear upon veterans' programs.[6] *See* pp. 21-29, *infra*. Since the lower court did not consider the interest of Congress in informing itself, the court's application of a "heightened level of scrutiny," *Taxation*, J.S. at 40a, did not reflect that degree of deference customarily employed by the judiciary when reviewing the validity of acts of a coordinate branch of government which further that branch's own constitutional performance. But as this Court has observed, "in no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (plurality opinion) (rejecting an equal protection challenge to an exercise of Congress's spending power).

Congress employs many devices to inform itself. It has created entities like the Congressional Budget Office, the Office of Technology Assessment, and the Congressional Research Service of the Library of Congress to that end. Its Members employ large staffs, and undertake worldwide fact-finding missions. It requires regular reports from the Executive Branch and the independent agencies regarding their activities. Through its committees, which also employ large staffs, it conducts hearings on a broad variety of subjects. In the hearing process, Congress invites willing witnesses to appear, and, through its subpoena and contempt powers, compels the appearance of those reluctant to come forward. It is particu-

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[6] Because of the independent constitutional significance of the use to which Congress puts information it obtains to carry out its responsibilities, *amici* will not address the role which the right to hear might play in the equal protection analysis if the recipient were a private entity without public responsibilities. *See, e.g., Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 756-7 (1976).

larly with respect to the hearing process that the tax differential challenged by appellee can be shown to serve an especially useful governmental purpose.

Veterans' organizations are unique sources of information that Congress has traditionally found to be extremely helpful in formulating public policy with respect to the nation's veterans. When Congress found it necessary to restrict the lobbying expenditures which certain organizations could make if they desired to maintain their tax status, it could reasonably have assumed that extension of the restriction to veterans' organizations would have reduced their willingness to provide information to Congress for fear of jeopardizing their tax status. Congress's decision not to extend the lobbying restriction to veterans' organizations is surely preferable to the alternatives of having to resort to compulsory process to obtain their views, or having to remove the restriction altogether, leaving unresolved the problem concerning charitable organizations that led to its enactment.

There are three primary constitutional functions of Congress which the provision of information by veterans' organizations, and therefore the tax differential, can distinctively assist Congress in performing. The most obvious is the legislative function, Art. 1, § 8, U.S. Const., a vital task in the area of veterans' programs: "Legislation relating to veterans has played an important role in the activity of every Congress since the founding of our Nation." *House Comm. on Veterans' Affairs, 97th Cong., 2d Sess., History of House Committees Considering Veterans Legislation* 1, Comm. Print No. 93 (1982). A second and related Congressional function is the "informing function," understood to be the manner by which "Congress informs itself collectively by way of hearings of its committees." *Hutchinson v. Proxmire*, 443 U.S. 111, 132 (1979). A third, and also related, function is that of oversight, which "encompasses inquiries concerning the administration of existing laws as well as proposed or

possibly needed statutes." *Watkins v. United States*, 354 U.S. 178, 187 (1957).[7]

The decision of Congress not to extend the lobbying restriction to veterans' organizations is one which furthers the exercise of Congress's constitutional powers to legislate, inform itself and oversee the administration of federal laws. It represents only one of a number of ways in which some who would seek to influence Congressional decisions are treated differently from others with the same objective by the Internal Revenue Code and other provisions adopted by the Congress. *See, e.g.*, Section 4945 (subjecting private foundations to a special penalty tax if they engage in any lobbying); Section 501(h)(3) (precluding, *inter alia*, churches and certain tax-exempt supporting organizations from electing the liberalized lobbying rules available to Section 501(c)(3) organizations generally); Section 162(e) (permitting a business deduction for certain lobbying activities but not others); Federal Regulation of Lobbying Act, 2 U.S.C. § 266 (imposing the requirements of the Act on some, but not others, who would attempt to influence federal legislation); Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611(c)(1)(iv) and 613 (requiring in part the registration of some, but not others, who would make representations to the Congress); and Rule VII, Standing Rules of the Senate (requiring different treatment of petitions to the Congress by different classes of petitioners).

For evident reasons, challenges to actions taken by Congress to obtain needed information have generally been made by recalcitrant witnesses who object to compulsory process,[8] not by volunteers whose willingness to

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[7] The unique assistance that veterans' organizations can offer Congress in perfoming these functions is described at pp. 21-29, *infra*.

[8] *See generally* Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926).

come forward has been treated less favorably than others, as in the contexts just discussed.[9] But the nature of the challenge is the same in the sense that it calls into question Congress's fundamental power, as a co-equal branch of government, to determine what information it requires to perform its constitutional functions and how best to obtain that information. The same standard of review should therefore apply. That standard is variously expressed in terms of giving "great weight to the decisions of Congress," *Fullilove*, *supra* p. 4, 448 U.S. at 472; the need for the Court to "tread warily," *United States v. Rumely*, 345 U.S. 41, 46 (1953) (conviction for contempt of Congressional committee reversed); and the need to give Congress "ample scope" in its legislative decisions, *Watkins*, *supra* p. 9, 354 U.S. at 215 (also reversing a contempt of committee conviction).[10] The level of equal protection scrutiny most consistent with this standard is the rational basis test.[11]

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[9] Indeed, *amici* know of no instance in which it has been suggested that Congress's decision to invite, subpoena, or encourage a particular witness or class of witnesses to present their views on a specified subject necessitates equal treatment of others who wish to be similarly heard on the same subject.

[10] Such deference is particularly appropriate when Congress is seeking information that affects the national defense. This Court has recognized that veterans' benefits are clearly related to the government's "substantial interest in raising and supporting armies," *Johnson v. Robison*, 415 U.S. 361, 385 (1974), and has recently reaffirmed that "in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." *McCarty v. McCarty*, 453 U.S. 210, 236 (1981).

[11] *Cf. United States v. Harriss*, 347 U.S. 612 (1954), in which the Court, in upholding the Federal Regulation of Lobbying Act against a constitutional challenge, concluded that "[t]o do [otherwise] would be to deny Congress in large measure the power of self-protection." 347 U.S. at 625-626. A similar deference is warranted here, because to do otherwise would be to deny Congress the equally important power to inform itself.

B. *The tax differential does not sufficiently affect the exercise of appellee's fundamental rights under the First Amendment to justify abandonment of traditional deference to legislative classifications.*

Even if Congress's independent interest in receiving information were not involved in this case, traditional equal protection analysis would mandate review of this classification under a rational basis standard. A starting point for analysis is the Court's observation that in the area of taxation, "legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940); *see also San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973). In this mode of deference, "a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest," *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973), a standard fully applicable to distinctions drawn by Congress in the Internal Revenue Code. *See, e.g., United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970).

The only argument available in this case to support a stricter standard of review rests on the impact of the lobbying restriction on the exercise of appellee's fundamental rights under the First Amendment. But the fact that a challenged classification has some incidental effect on the exercise of a fundamental right is not sufficient to raise the level of scrutiny under which its validity is measured. Rather, it is the "directness and substantiality of the interference" with such exercise that determines the standard. *Zablocki v. Redhail*, 434 U.S. 374, 386-7 (1978) (holding invalid a classification which did so affect the right to marry). The Court there observed:

> [W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, *reasonable* regulations that do not *significantly* interfere with

> decisions to enter into the marital relationship may legitimately be imposed.

Id. at 387 n.12 (emphasis added) (distinguishing *Califano v. Jobst*, 434 U.S. 47 (1977), in which such "reasonable" regulations of the right to marry were upheld).

The Court of Appeals itself indicated the absence of such significant interference with a fundamental right in this case when it held, in a portion of its opinion that is not before the Court, *see* note 5, *supra*, that appellee "has not shown that Section 501(c)(3)'s lobbying restriction abridges its First Amendment rights." *Taxation*, J.S. at 35a. The restriction to which charitable organizations are subject is no more an infringement of their First Amendment rights than was the prohibition, upheld by this Court in *Cammarano v. United States*, 358 U.S. 498 (1959), against the deduction of lobbying expenses by businesses. The Section 501(c)(3) restriction, like that in *Cammarano*, "is plainly not 'aimed at the suppression of dangerous ideas.'" *Id.* at 513.

A similar relationship between a challenged classification and a fundamental right was presented in *Johnson v. Robison*, *supra* note 10, 415 U.S. 361 (1974). There, a conscientious objector claimed that denial to him of veterans' benefits interfered with his fundamental right to the free exercise of religion. The Court reasoned:

> [S]ince we hold . . . that the Act does not violate [Robison's] right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.

Id. at 375 n.14. Given the conclusion of the Court of Appeals that the tax differential does not abridge appellee's First Amendment rights, there is equally "no occasion" here to look for more than rationality in the statutory scheme.

Buckley v. Valeo, 424 U.S. 1 (1976), relied on by the Court of Appeals, is not to the contrary. In *Buckley*,

the Court distinguished earlier cases in which it had applied "exacting scrutiny" to "direct burdens" on access to the electoral process, and found that because the public financing provisions under review were "less restrictive," they did not call for application of the higher standard. 424 U.S. at 94. The Court then observed that "[i]n any event," those provisions furthered "sufficiently important governmental interests." *Id.* at 95. The latter observation, unnecessary as it was to the decision in the case, is hardly a warrant for the Court of Appeals to have said that in applying a more demanding standard than a rational basis it was "guided by" *Buckley*. *Taxation*, J.S. at 41a.

Other courts have continued to defer to legislative classifications even where, as in *Buckley*, they have had some impact on fundamental rights. *See, e.g., Johnson v. United States*, 422 F. Supp. 958, 971-2 (N.D. Ind. 1976), *aff'd sub nom. Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977) (explicitly adopting the District Court's opinion), *cert. denied*, 434 U.S. 1012 (1978) (upholding the differential tax treatment between married and unmarried couples despite the fact that it "*may* constitute a penalty" on "a right as fundamental as that of marriage," because of considerations of "judicial deference" and "the inherently complex nature of legislative decisions in the field of taxation"). The classification at issue here should be accorded a similar deference.

II. Substantial Governmental Interests Support the Different Tax Treatment of Lobbying by Veterans' and Charitable Organizations.

The Court of Appeals concluded that "absolutely no governmental interest whatsoever" exists as a basis for the statutory classification in Section 501(c). *Taxation*, J.S. at 66a. *Amici* contend that in drawing this conclusion, the Court of Appeals failed to identify and give proper weight to unique characteristics of veterans' organizations which distinguish them from charities with

respect to lobbying, and did not consider and give effect to Congress's constitutional interests in informing itself.[12] These differences underlie both the absence of reasons to extend the Section 501(c)(3) restriction to veterans' organizations, and the presence of substantial reasons to refrain from such an extension.

A. *The reason for restricting the lobbying activities of charitable organizations does not apply with equal force to veterans' organizations.*

The Court of Appeals acknowledged that when Congress originally enacted the lobbying restriction of Section 501(c)(3)'s predecessor provision in 1934, it was doing so in part "to restrict selfishly motivated political agitation, meant to secure some personal interests of the donor . . . ," *Taxation*, J.S. at 61a, and "to curb what it regarded as abuses by Section 501(c)(3) organizations then eligible to use tax-deductible contributions for lobbying activities." *Id.* at 58a. The lower court suggested, however, that confining the expenditure restriction to charities rather than extending it to such groups as veterans' organizations "may simply have been a drafting oversight . . . ." *Id.* at 52a. The lower court also stated: "There is no evidence whatsoever that the lobbying of veterans is less subject to abuse by private interests than that of other Section 501(c) groups." *Id.* at 64a-65a. *Compare* note 12, *supra*.

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[12] These omissions are not entirely surprising because, as the Court of Appeals observed with respect to support offered to justify the challenged classification: "The government made no attempt in the district court to present affidavits or other evidentiary materials." *Taxation*, J.S. at 49a. The factual record herein is also scant because this case came on for decision on cross motions for summary judgment. Despite these deficiencies in the record and veterans' organizations' lack of opportunity to participate in the proceedings below, however, *see* note 3, *supra*, *amici* will rely primarily upon a substantial body of material developed from public records and reports to support their arguments which follow.

Amici disagree with the Court of Appeals on both points. First, there can be no doubt that Congress deliberately chose to restrict the activities charities could undertake to influence legislation, and not to restrict such activities by veterans' organizations. Second, there were sound reasons in 1934, which persist today, for Congress to believe that veterans' organizations present less risk than charities that they would abuse their tax-deductible status in their lobbying activities.

An examination of the legislative history of the lobbying restriction shows that Congress was aware that it would not apply to veterans' organizations, but decided not to revise the provision to include them. The lobbying restriction was initially contained in the revenue bill reported by the Senate Finance Committee, which had added the restriction to the House bill by amendment. H.R. 7835, §§ 23(o) and 101(d), accompanying S. Rep. No. 558, 73d Cong., 2d Sess. (1934). In explaining this amendment, Senator Harrison, chairman of the Finance Committee and the Senate sponsor of the revenue bill, stated in the floor debate on the measure:

> [T]here are *certain organizations* which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment to stop that, so that is why we have put this amendment in the bill.

78 Cong. Rec. 5959 (1934) (emphasis added). Senator Harrison noted that as written, the amendment would not apply the restriction to all types of organizations, and specifically pointed out that veterans' organizations were not affected. *Id.* at 5961. Nonetheless, the bill as amended was passed by the Senate, with the understanding that the conference committee could resolve "any inequity." *Id.* at 5959.

The only revision that emerged from the conference, however, was the deletion of Senate language which would have extended the restriction to "participation

in partisan politics" as well as lobbying. H. Rep. No. 1385, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 7816 (1934). Moreover, the Conference Committee adopted Senator Harrison's reference to "certain organizations," H. Rep. No. 1385, 73d Cong., 2d Sess. 17 (1934), rather than the formulation of the Senate Report, which had referred to "an" organization in describing the entities to which the restriction applied. S. Rep. No. 558, 73d Cong., 2d Sess. 26 (1934).

It is thus clear that the Conference Committee explicitly considered the provision containing the challenged restriction, in terms of both the language of the provision and the Committee's explanation of that provision. Since the ultimate version of the provision nonetheless remained, as Senator Harrison had pointed out, inapplicable to veterans' organizations, it seems hardly supportable to maintain that this result stemmed from Congress's "lack of attention" to the matter. *Taxation*, J.S. at 56a.

As to the second point, Congress not only persisted in leaving veterans' groups unrestricted by the tax provision, but also implicitly determined that to do so would not create the "inequity" which the conference was expected to resolve. The conclusion that it was equitable not to extend the restriction to veterans' organizations was soundly based, as the committee which originated the lobbying restriction well knew.

In 1934 the Finance Committee, in addition to its responsibilities for tax legislation, was also the Senate committee with jurisdiction over most veterans' programs. *See Historical Development of Veterans' Legislation Under Finance Committee Leadership*, 116 Cong. Rec. 35037 (1970). This expertise in veterans' affairs, necessarily including knowledge of the nature of veterans' organizations, was thus possessed not only by the body that originated the lobbying restriction, but also by the Conference Committee that reported the legislation as passed, participants in which were Senator Har-

rison and other members of the Senate Finance Committee. 78 Cong. Rec. 6712 (1934).

Several factors unique to veterans' organizations were present in 1934 which provided a basis for Congressional confidence that they were less likely than charities to abuse their tax status in their lobbying activities.[13] Most significant for present purposes were membership restrictions, which tended to confine the activities of veterans' groups to those issues that were of common interest to their diverse members (essentially, veterans' benefits issues); federal charters and reporting requirements, which made veterans' groups more subject than charities to Congressional control; and, compared with charities, fewer numbers of veterans' groups and more regular Congressional exposure to them, which allowed for greater Congressional familiarity with their legislative activities.

There were two federal sources of membership restrictions applicable to veterans' organizations. First, Section 23(o)(4) of the Revenue Act of 1934, c. 277, 48 Stat. 680, 690, made deductible contributions to "posts or organizations of *war* veterans" (emphasis added). Second, federal charters of veterans' organizations imposed restrictions of similar effect. For example, Section 5 of DAV's charter then provided that no person could be a member of DAV unless he or she were disabled during World War I and were honorably discharged. Act of June 17, 1932, c. 268, 47 Stat. 321. Thus, unlike charities, to which no such membership restrictions applied, veterans' groups were from the outset organizations whose members were united not by

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[13] For a decade before the enactment under discussion, Congress had been treating charities separately from veterans' organizations in the Internal Revenue Code. In 1924, veterans' organizations were given separate recognition in the code, with Section 214(a)(10)(A) providing for tax-deductible contributions to charities while Section 214(a)(10)(D) did the same for veterans' organizations. Revenue Act of 1924, c. 234, 43 Stat. 253.

a common political or ideological outlook but by the common experience of service to their country in uniform. As such, veterans' organizations would be peculiarly resistant to efforts by those who would make tax-deductible donations in order to advance their own "personal interests" before the Congress. The object of veterans' groups' legislative activity, derived from the consensus of their memberships, would predictably be the advancement of veterans' programs, the benefits of which would inevitably be enjoyed by large numbers of persons even if they also served a particular donor's "personal interests." Such an outcome could not reasonably be said to constitute the abuse Congress was seeking to avoid.

A further basis for Congressional belief that veterans' organizations were less likely than charities to abuse their lobbying privileges lay in the federal charters that governed the major veterans' organizations.[14] The significance of federal charters is that, unlike the general body of law enacted by the States to which charities are generally subject, there is no general body of law applicable to the operation and powers of corporations chartered by the Congress. Individual provisions are therefore included in each Act of Congress incorporating the organization. *See generally Corporations Chartered by Act of Congress*, Congressional Research Service, Library of Congress, Report No. 73-31 A (1973). Such enactments not only set forth limited purposes of the chartered organizations,[15] but because they are part of

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[14] By 1934, Congress had provided federal charters to at least four veterans' groups: the American Legion, 41 Stat. 284 (1919), the Grand Army of the Republic, 43 Stat. 358 (1924), the United States Blind Veterans of the World War, 43 Stat. 535 (1924), and *amicus curiae* herein, the Disabled American Veterans, 47 Stat. 320 (1932).

[15] For example, DAV's charter included the purpose "to advance the interest and work for the betterment of all wounded, impaired and disabled veterans of the World War." Act of June 17, 1932, c. 268, 47 Stat. 320-21.

federal law, they can be amended by Congress as it sees fit.[16] Thus, by 1934 Congress had already restricted the activities in which major veterans' groups could engage, and was free to restrict them further if, for example, their lobbying appeared to represent an abuse of their tax status.

Finally, Congress had greater familiarity with the scope of legislative activities undertaken by veterans' organizations because of their substantially fewer numbers, *cf. Taxation*, J.S. at 73a, and the unique relationship that had developed even then between Congress and the major veterans' organizations in the legislative process. *See* pp. 24-25, *infra*. For example, at the beginning of each session of Congress those groups participate in hearings before the cognizant Congressional committees to present their proposals for legislative and budgetary action, without regard to any pending legislation. This unusual practice had its antecedents before the 1934 legislation. *See, e.g., World War Veterans' Legislation: Hearings Before the House Comm. on World War Veterans' Legislation*, 69th Cong., 1st Sess. (1925) (including appearance by DAV). Congress was thus better informed about the scope and nature of legislative activities by veterans' organizations than about those by charities, and was therefore better able to appraise the risk of lobbying abuses that veterans' organizations might present.

These features distinguishing veterans' organizations from charities continue today. Membership restrictions on veterans' organizations have emerged in additional statutory provisions. *See, e.g.*, Section 501(c)(19) (requiring that at least 75% of the membership of a veterans' organization be past or present members of the Armed Forces of the United States). Federal char-

[16] For example, in 1967 DAV's charter was amended to add 36 U.S.C. § 90i(b), calling in part for DAV to submit to the Comptroller General for auditing purposes a report of all its receipts and expenditures. Pub. L. 90-208, § 1, 81 Stat. 655 (1967).

ters still restrict the organizations' purposes, as with respect to DAV (36 U.S.C. § 90c) and PVA (36 U.S.C. § 1153), and state that each organization is nonpolitical and may not promote the candidacy of any person seeking public office. 36 U.S.C. §§ 90f (DAV) and 1156 (PVA). The practice of annual appearances by the major veterans' groups to present their recommendations to the Congress also continues. *See, e.g., FY82 Legislative Recommendations of Veterans' Organizations: Hearings Before the Senate Comm. on Veterans' Affairs*, 97th Cong., 1st and 2d Sess. (1982) ("1982 Senate Hearings") (including legislative recommendations of DAV and PVA).

Moreover, *amici* engage in significant self-regulation. For example, DAV is careful to confine the scope of its legislative activities by adopting a "Statement of Policy" at each annual convention that provides, in part, that the organization "will not take action on any resolution that proposes legislation designed to provide benefits for other than wartime, service-connected disability." *See, e.g., Sixty-First National Report of the Disabled American Veterans, 1981*, H. R. Doc. No. 104, 97th Cong., 1st Sess. 47 (1981);[17] *see also* note 24, *infra*, and accompanying text.

With the foregoing mechanisms in place and available to impose additional restrictions if the need arose, Congress had no need to impose on veterans' organizations the broad prophylactic of the lobbying restriction that it used to limit charities' potential for lobbying abuse. Congress had already employed legislative means individually tailored to veterans' groups that accomplished essentially the same end, and it was well acquainted with

[17] In 1970, Congress reenacted and codified earlier laws providing that the proceedings of the annual conventions of a number of veterans' organizations, including DAV, be printed at public expense as official documents of the House of Representatives. *See* 44 U.S.C. § 1332.

the effect of those means. These and other circumstances persist today to yield at least as acceptable a result, as demonstrated by Congress's 48-year refusal to extend the lobbying restriction to veterans' organizations.[18]

B. *The substantial governmental interest of assisting Congress to perform its constitutional functions is served by confining the lobbying restriction to charities, thereby preserving unimpeded the flow to Congress of information uniquely possessed by veterans' organizations and important to effective Congressional actions concerning veterans' affairs.*

In considering the governmental interests served by the tax classification in this case, the Court of Appeals discussed purposes relating to lobbying by businesses, the interests of veterans' organizations, and concerns about charitable organizations. *Taxation*, J.S. at 46a-62a. The court gave no consideration, however, to the independent interests of Congress in receiving information from veterans' organizations.[19]

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[18] If Congress had wanted to extend the restriction to veterans' organizations, an opportune time to have done so would have been this year, when it revised a subsection of Section 501(c) that specifically applied to veterans' organizations. *See* 26 U.S.C. § 501(c)(19), as amended by Section 354(b) of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. 97-248, 96 Stat. 324. That section of TEFRA expands the types of organizations that fit within the Section 501(c)(19) exemption. The possibility of extending the lobbying provision did not even arise during consideration of the amendment. *See, e.g.*, Joint Explanatory Statement of the Committee of Conference, H. Rep. No. 760, 97th Cong., 2d Sess. 679 (1982), *reprinted in* [1982] U.S. Code Cong. and Ad. News No. 7, at 666-667.

[19] The Court of Appeals also confined itself to interests actually relied upon in the legislative record. *Taxation*, J.S. at 49a, 65a n.44. Whatever the validity of that proposition when a heightened level of scrutiny is applied to a legislative classification, the appropriate standard of review in this case is rationality, as *amici* have argued. The Court of Appeals' reliance on *Califano v. Goldfarb*, 430 U.S. 199 (1977), is thus misplaced because the gender-based classification there was held to a higher level of scrutiny than is called for

Amici submit that Congress rationally seeks to be well informed about the needs of veterans and programs designed to meet those needs; that veterans' organizations possess information of special value to Congress in evaluating those needs and programs; and that by not extending the lobbying restriction to veterans' organizations, Congress rationally furthered the substantial governmental interest in the effective performance of its constitutional duties.

As observed earlier, *supra* p. 8, veterans' legislation "has played an important role in the activity of every Congress since the founding of our Nation." Congressional commitment to veterans is substantial, due in part to the extraordinary service these men and women have rendered;[20] in part to the need to provide a sufficient incentive to future generations to serve in the armed forces, *see* note 10, *supra*; and in part to the sheer size of the veteran community. The Veterans Administration ("VA") estimated that in 1981 over 30 million Americans were veterans. 1981 VA Ann. Rep. 3.[21] The

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by the rational basis test. *Id.* at 210. Accordingly, the classification at issue here should "not be set aside if any state of facts reasonably may be conceived to justify it." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Even if more rigorous scrutiny were appropriate, however, this Court should still consider the interests of Congress itself as bases for the legislative classification at issue. These interests are not only "conceivable," but actual, in that they inherently underlie any distinction drawn in a statute regulating communication with the Congress which has the effect of preserving such communication.

[20] Veterans occupy a special position in our national life. In order to defend our collective freedoms, veterans have suffered restriction of their personal freedom and *"the mental and physical hazards as well as the economic and family detriments"* that are implicit in military service. *Johnson v. Robison*, *supra*, 415 U.S. 361, 379-380 (emphasis in original). The Government has set forth some of the important reasons for favoring veterans, J.S. at 19-20, and the dissent below has identified others. *Taxation*, J.S. at 115a.

[21] The VA's 1981 Annual Report continues:

> Living veterans are only a part of the total number of potential recipients of VA benefits. As of September 30, 1981, . . .

VA budget for fiscal 1983 exceeds $24 billion. HUD-Independent Agencies Appropriation Act, 1983, Pub. L. 97-272, 96 Stat. 1173-1176 (1982).

To provide benefits and preferences for veterans on such a scale is unquestionably within Congress's constitutional power. *See, e.g., Personal Adm'r v. Feeney*, 442 U.S. 256 (1979). In furtherance of that objective, Congress is entitled to seek information from a variety of sources about the needs of veterans and about the effectiveness of legislative efforts to provide for those needs. As this Court long ago recognized:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.

McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

In this case, those "who do possess" the "required information" are veterans' organizations. The unique relationship that these organizations have with both individual veterans throughout the United States, and the VA as the principal agency which administers veterans' programs, has led Congress to recognize that they serve a special office in helping Congress discharge its various functions with respect to veterans' affairs.

The degree and nature of veterans' organizations' involvement in the hearing process is evidence of Congress's special interest in the information they have to provide. For example, during calendar year 1981, DAV

> the total population of beneficiaries [was] some 89.5 million, or approximately ***39 percent of the resident population of the United States.***

1981 VA Ann. Rep. 4 (emphasis added).

and PVA provided formal testimony before committees of Congress on at least fifty occasions, more than forty of which were before the Veterans' Affairs Committees (or subcommittees thereof) of the House or Senate.[22] Of course, these appearances could not have occurred absent the desire of Congress to hear from DAV and PVA.[23] Furthermore, on each occasion, the testimony provided by DAV and PVA concerned the needs of and provision of benefits to veterans, or the administration of programs directly affecting veterans, and was thus confined to the subject matter of their particular competence which warrants the Congessional attention such testimony receives.[24]

Another manifestation of Congress's unusual reliance on the provision of information by veterans' organizations lies in the special hearings held before the Veterans' Affairs Committees of both Houses of Congress at the start of each session. At these hearings, each of the major veterans' organizations is invited to present its legislative and budgetary proposals. *See, e.g.*, 1982 Senate Hearings, *supra* p. 20; *Legislative Recommendations of Veterans' Organizations, 1978: Hearings Before the House Comm. on Veterans' Affairs*, 95th Cong., 2d

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[22] These appearances of DAV and PVA are a matter of public record, contained in committee prints of proceedings before the full committee or a subcommittee of the Veterans' Affairs Committees of the House and Senate; the Budget, Appropriations, Government Operations, and Ways and Means Committees of the House; and the Appropriations and Labor and Human Resources Committees of the Senate.

[23] For example, in calendar year 1981 DAV alone received and has on file 38 formal invitations to present its views before the House and Senate Veterans' Affairs Committees.

[24] See text accompanying note 17, *supra*. The history of the legislative activities of *amici*, therefore, bears little resemblance to the spectre, conjured up by the Court of Appeals, of veterans' organizations "lobbying on any side of any issue they choose . . . ." *Taxation*, J.S. at 77a.

Sess. (1978) ("1978 House Hearings").[25] As Chairman Simpson of the Senate Veterans' Affairs Committee stated during such hearings conducted this year:

> These annual presentations give us on the Committee an excellent opportunity for members to become more familiar with the views of the membership of veterans' organizations on the legislative needs relating to veterans. These sessions assist the committee in planning its priorities for the year.

1982 Senate Hearings at 60. This consistent, formalized procedure to obtain the views of non-governmental entities in helping set a Congressional committee's legislative agenda is, so far as *amici* are aware, unique in the legislative process, and these hearings have been conducted since before the enactment of the lobbying restriction at issue. *See* p. 19, *supra*.[26]

Because veterans' organizations have a special relationship with both individual veterans and the VA, it is manifestly reasonable for Congress to seek information from them. Their knowledge of the needs of veterans derives directly from their large and diverse memberships and from their service programs for members and others. DAV, for example, has over 700,000 members, while PVA's membership of 11,000 represents more than half of all American veterans with spinal cord injury or disease. DAV has approximately 2,500 subordinate organizations nationwide, while PVA has chapters in 35 states, Mexico and Puerto Rico. Communication among these many

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[25] This procedure has become so well established that frequently, a veterans' organization witness will appear one day before the House committee and the next day before the Senate committee. 1978 House Hearings at 1 (statement of Chairman Roberts).

[26] Other indicia of Congressional interest in the views of veterans' organizations include Congress's decision to print as public documents the proceedings of the annual conventions of major veterans' groups, *supra* note 17. This decision also preceded the enactment of the 1934 lobbying restriction. *See, e.g.*, 46 Stat. 1481 (1931) (extending the privilege to DAV).

widely dispersed veterans, their local chapters and their national organizations occurs at many levels, from informal oral contacts through annual national conventions. Plainly, this interaction intimately acquaints veterans' organizations with the widest range of concerns of individual veterans and thus uniquely positions those groups to suggest to Congress remedial legislation and other measures bearing on veterans' needs.

The service programs operated by veterans' organizations, supplying essential advocacy assistance otherwise unavailable to claimants for veterans' benefits, also enable those organizations to provide Congress with a unique perspective on individual veterans' needs. Despite the magnitude of benefit programs for which veterans are eligible, Congress has effectively barred veterans from obtaining the assistance of private counsel to secure those benefits. Under the claims procedures set forth in Title 38 of the United States Code, the Administrator of Veterans' Affairs must recognize individuals, 38 U.S.C. § 3404(a), or representatives of national organizations (expressly including DAV), 38 U.S.C. § 3402(a)(1), before such individuals or representatives may prepare, present or prosecute any claim under laws administered by the VA. 38 U.S.C. § 3401. Moreover, neither recognized representatives nor recognized individuals may charge a fee to their clients, 38 U.S.C. §§ 3402(b)(1) and 3404, and the VA is authorized to pay only recognized individuals a maximum of $10 per claim. 38 U.S.C. § 3404(c)(2).[27]

The practical effect of these provisions is to require any potential beneficiary of a veterans' program who

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[27] As is the case with other important features of Congress's relationship with veterans' organizations, the provisions for VA (then called the U.S. Veterans' Bureau) recognition of representatives of national organizations, including DAV, and limiting to $10 the payment that the VA may make to recognized individuals, predate the 1934 lobbying restriction. *See* Act of March 4, 1925, § 16, 43 Stat. 1311.

needs advice about making a claim for benefits normally to seek out a recognized representative of a national veterans' organization if the VA itself is unable to provide that assistance.[28] The experience thus gained by veterans' organizations enables them to provide Congress with information unavailable from any other source.[29]

Congress has demonstrated a singular interest in serving the needs of veterans with service-connected disabilities.[30] Understandably, Congress would look particularly to DAV and PVA for information about these veterans because of the nature of *amici's* memberships and purposes. Moreover, it will be such veterans who likely will first have need for government assistance when they leave military service, and it will be DAV and PVA to

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[28] To provide a sense of scale, in fiscal year 1981 over 68,000 claims denials were appealed to the VA's Board of Veterans' Appeals. 1981 VA Ann. Rep. 95.

[29] Of all national veterans' organizations, DAV and PVA are particularly well qualified to be of assistance to Congress in this regard. DAV operates the largest national service program in the United States. Currently staffed by 267 national service officers employed in 68 cities across the country, the program provides counselling for veterans and their families concerning VA disability benefits, rehabilitation programs and other available services. These officers, all of whom undergo extensive training by DAV, also act as attorneys in fact for veterans who wish them to do so. As such, during the year ending June 30, 1981, DAV officers assisted veterans and their families to secure almost one billion dollars in retroactive annual and new monthly benents from the federal government. DAV makes these services available not only to its own members but also to all veterans. PVA, too, operates a national service program, employing 50 full time service officers in 44 offices throughout the United States. PVA's national service program accounts for more than 60% of its annual budget.

[30] Medical programs accounted for approximately 30% of the VA's budget in fiscal year 1981. 1981 VA Ann. Rep. 95. In addition, disabled veterans are entitled to compensation and pension payments, and Congress recently increased the rate of compensation for veterans with service-connected disabilities, and their survivors, by 14.3%. Pub. L. 96-385, 94 Stat. 1528 (1980).

whom they will likely first turn in the private sector for help in meeting those needs. Congress can therefore legitimately expect that the views of DAV and PVA would be important in responding with prompt effectiveness to needs as to which Congress has been particularly solicitous.

A unique relationship also exists between veterans' organizations and the VA, and this, too, gives veterans' organizations distinctive information relevant to Congressional functions. Upon recognition of representatives of veterans' organizations as described above, the Administrator is empowered to furnish "space and office facilities for the use of paid full-time representatives of national organizations so recognized." 38 U.S.C. § 3402. Implementation of that provision has resulted in the presence of veterans' organizations' representatives throughout the VA system, from the central office in Washington to the VA regional offices and medical centers across the United States.[31]

Of at least equal significance in this regard is the power of the Administrator to "authorize an inspection of [VA] records by duly authorized representatives of recognized organizations."[32] 38 U.S.C. § 3301(d). With such authorization, recognized service officers can have access to agency data virtually as though they were employees of the agency. Finally, veterans' organizations are regularly involved in the functioning of the VA, as illustrated by the Congressional mandate that the national service officers of recognized organizations "shall be consulted" in the VA's promulgation of regulations dealing

[31] In addition, the VA's Voluntary Service program, which provides workers who serve without fee in VA medical centers, *see* 38 U.S.C. § 213, is staffed in large measure by volunteers recruited from veterans' organizations and their auxiliaries.

[32] Again as with other authorities and practices discussed, this provision had its antecedents before the 1934 lobbying restriction was enacted. *See* Act of July 7, 1930, c. 849, § 7, 46 Stat. 994.

with the functions of authorized claims representatives. Act of June 22, 1944, c. 268, § 200(b), 58 Stat. 286. Armed with information inevitably obtained by its service officers from such office co-location, from access to agency data and from participation in internal agency decisionmaking, veterans' organizations have noteworthy contributions to make in Congress's efforts, *inter alia*, to provide effective oversight of the VA and its administration of veterans' legislation.

Veterans' organizations have thus occupied, and continue to occupy, a special position in the legislative process. Congress has long called upon these organizations to provide it with information which they uniquely possess and which Congress needs to carry out its functions in this vital area of national policy. It was surely rational for Congress to protect the flow of information between itself and veterans' organizations, and the method Congress selected to achieve this important objective was a rational one. As a coordinate branch of government, its choice in this respect is entitled to great deference.[33] Applying the proper standard, the differential tax treatment should be upheld.[34]

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[33] To the extent that such linedrawing by Congress may be perceived by some as being less than idea, the Court has recognized that " '[p]erfection in making the necessary classifications is neither possible nor necessary.' . . . As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred." *Schweiker v. Wilson*, 450 U.S. 221, 234-235 (1981), quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

[34] *Amici* assume that, if this Court were to uphold the decision of the Court of Appeals on the merits and were not persuaded to grant the remedy sought by appellee and strike the lobbying retriction in Section 501(c)(3), it would preserve for resolution on remand the appropriateness of granting any other remedy. Such an order would be necessary to permit consideration of important constitutional questions that would be raised by the imposition of any

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JOSEPH C. ZENGERLE *
ZACHARY R. KAROL
BYRON R. TRAUGER
KATHERINE H. WHEATLEY

BINGHAM, DANA & GOULD
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 822-9320

Counsel for Disabled American Veterans and Paralyzed Veterans of America

*Counsel of Record

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other remedy. For example, in light of appellee's opposition to relief that would adversely affect veterans' organizations, *see Taxation*, J.S. at 76a; Appellee's Jurisdictional Statement on Cross Appeal, at 7 and 9, *amici* would argue that there is no case or controversy herein that would permit a court to grant such relief. *See Williams v. Zbaraz*, 448 U.S. 358, 367 (1980) (holding that a court cannot create a case or controversy over statutory provisions not challenged by plaintiff); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (holding that a remedy desired by no parties should not be forced on them); *Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316, 318 (3rd Cir. 1944), *cert. denied*, 325 U.S. 867 (1945) (holding that judgment cannot be given on a question not raised in litigation between the parties). Even if appellee were to change its position and accept such relief, *amici* would argue that appellee has no standing to seek it. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 75 n.20 (1978); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).